

Explanatory Memorandum to The Special School Residential Services (Service Providers and Responsible Individuals) (Wales) Regulations 2024

This Explanatory Memorandum has been prepared by Health and Social Services Department and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Special School Residential Services (Service Providers and Responsible Individuals) (Wales) Regulations 2024. I am satisfied that the benefits justify the likely costs.

Julie Morgan MS
Deputy Minister for Social Services

16 January 2024

PART 1

1. Description

The Regulation and Inspection of Social Care (Wales) Act ('the 2016 Act') provides the statutory framework for the regulation and inspection of social care services and the regulation of the social care workforce in Wales. To help achieve this it provides the Welsh Ministers with a range of regulation-making and other subordinate legislation powers.

This Explanatory Memorandum relates to *the Special School Residential Services (Service Providers and Responsible Individuals) (Wales) Regulations 2024* ("the 2024 Regulations") which creates the regulations which will place requirements on providers and responsible individuals, including requirements as to the standard of care and support to be provided. The regulations also amend the Regulated Services (Annual Returns) (Wales) Regulations 2017 and the Regulated Services (Penalty Notices) (Wales) Regulations 2019 to include to *special school residential services*.

The 2024 Regulations are being laid before the Senedd under the affirmative procedure and will come into force on 29 February 2024.

2. Matters of special interest to the Legislation, Justice, and Constitution Committee

No specific matters have been identified.

3. Legislative background

The powers enabling these regulations to be made are contained in several sections within the 2016 Act as cited below:

- Section 10 – requirements to submit an annual return.
- Section 21(5) - relates to the designation of a responsible individual despite the eligibility requirements not being met.
- Section 27 - enables requirements to be placed on a service provider of a regulated service.
- Section 28 – enables requirements to be placed on a responsible individual of a regulated service.
- Section 30 - relates to service providers who are liquidated.
- Section 31 - deals with service providers who have died.
- Section 45 - deals with failure to comply with requirements in regulation by a service provider.
- Section 46 deals with failure to comply with requirements in regulation by a responsible individual.
- Section 52 – enables a system of penalty notices and to prescribe offences.

The Regulations follow the Senedd's draft affirmative procedure.

4. Purpose and intended effect of the legislation

The purpose of the 2024 Regulations is to set the quality standards against which *special school residential services* will be regulated and inspected against under the 2016 Act. These regulations will help to ensure that the individuals attending the *special school residential services* who need care and support receive quality care. The proposed approach recognises the differences between *special school residential services* where children stay at the school overnight for between one and four nights a week but live with their parents, and care home services where adults or children reside full-time.

The 2024 Regulations will replace the National Minimum Standards (NMS) for Residential Special Schools made under section 23(1) of the Care Standards Act 2000. The NMS are not enforceable and are focussed on achieving a minimum standard which is not consistent with the broader policy direction on regulation and inspection established under the 2016 Act, and implemented in regulations developed for other regulated services under the 2016 Act, such as the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (“the 2017 Service Provider and Responsible Individual Regulations”).

The purpose of the 2024 Regulations is also to amend the substantive regulations relating to annual returns and penalty notices for existing regulated services to include *special school residential services*.

Key aspects of the 2024 Regulations are:

4.1 Annual returns

The Regulated Services (Annual Returns) (Wales) Regulations 2017 set out the additional information requirements to be included in a provider annual return. This includes information about staffing, training, workforce planning, service provision and additional information where the service involves the provision of accommodation. The regulations require the return to be made online using the form provided on the Welsh Government, Care Inspectorate Wales (CIW), website and require the return to be submitted within 56 days of the end of the financial year to which it relates. The 2024 Regulations replicate the requirements placed on other regulated services in regulations.

4.2 Responsible individuals

Section 21(5) of the 2016 Act enables the Welsh Ministers to specify the circumstances in which they, in practice CIW, the service regulator (instead of the service provider) may designate a responsible individual despite the eligibility requirements of the 2016 Act not being met. The purpose is to ensure that an otherwise competently run service, may continue without its registration being cancelled entirely where there is no-one capable of being designated as responsible individual. Additionally, Welsh Ministers can modify the requirements of the 2016 Act in so far as they relate to a responsible individual who is designated by the Welsh Ministers. The 2024 Regulations replicate the

requirements in the 2017 Service Provider and Responsible Individual Regulations.

4.3 Regulations about regulated services

Section 27 of the 2016 Act allows the Welsh Ministers to place requirements on a service provider in relation to a regulated service, including the requirements regarding the standard of care and support to be provided by a service provider.

The 2024 Regulations place requirements on service providers in relation to the governance, suitability of the service, information about the service, environment, staffing, staff training and safeguarding. When making regulations under this section consideration must be given to the importance of the well-being of any individual to whom care and support will be provided.

4.4 Regulations about responsible individuals

Section 28 of the 2016 Act allows the Welsh Ministers, through regulations, to place requirements on designated responsible individuals. Responsible individuals must meet the eligibility and fitness criteria prescribed in section 21 of the 2016 Act.

The 2024 Regulations place requirements on responsible individuals in relation to the compliance, quality, and oversight of the service, and ensuring the effective management of the service (including the appointment of a manager registered with Social Care Wales). The responsible individual must visit the service in person at least every 3 months. This replicates the requirements placed on other regulated services under the 2016 Act.

4.5 Regulations about service providers who are liquidated

Section 30 of the 2016 Act requires an “appointed person” to notify the Welsh Ministers, in practice CIW, of their appointment in the event of a service provider being liquidated. An “appointed person” is defined in the 2016 Act as:

- a receiver or administrative receiver of the property of a service provider who is a body corporate or partnership;
- a liquidator, provisional liquidator or administrator of a service provider who is a body corporate or a partnership;
- a trustee in bankruptcy of a service provider who is an individual or a partnership.

The 2024 Regulations require an appointed person to notify the service regulator, CIW, without delay of their appointment and within 28 days of their intentions regarding the future operation of the service.

4.6 Regulations about service providers who have died

Section 31 of the 2016 Act deals with notification requirements and modifications of the application of Part 1 of the 2016 Act in the event of the death of a service provider who is an individual.

The 2024 Regulations require that the personal representatives of an individual provider who has died must notify the Welsh Ministers, in practice CIW, of the death. The 2024 Regulations allow for the personal representatives of the individual to act in the capacity of the service provider for a set period. This replicates the requirements placed on other regulated services under the 2016 Act.

4.7 Offences: Failure by service providers and responsible individuals to comply with requirements in regulations

Section 45 of the 2016 Act allows the Welsh Ministers to prescribe certain breaches of the requirements of regulations made under section 27 as offences. Section 46 of the 2016 Act allows the Welsh Ministers to prescribe certain breaches of the requirements of regulations made under section 28 as offences. They provide that a failure, by the service provider and responsible individual respectively, to comply with specified requirements in the 2024 Regulations is an offence. There is a further qualification which applies in the case of failure to comply with certain requirements. In these cases, the regulation provides that this is only an offence if the failure to comply results in individuals being exposed to avoidable harm or significant risk of such harm or suffering a loss of money or property as a result of theft, misuse or misappropriation.

Failure to comply with a particular requirement in the 2024 Regulations may not be an offence but failure to comply with any of the requirements contained in Regulations within Parts 2 to 12 could be grounds for cancellation of the service provider's registration under section 15 of the 2016 Act; and a responsible individual's failure to comply with any of the requirements contained in Regulations within Parts 13 to 17 could be grounds for the cancellation of the designation of the responsible individual under section 22 of the 2016 Act. The 2024 Regulations replicate the requirements placed on other regulated services in regulations.

4.8 Penalty Notices

The Regulated Services (Penalty Notices) (Wales) Regulations 2019 set out the operational detail of the penalty notice system and the offences which may be discharged by the service provider or responsible individual (as applicable) making payment of a sum payable under a penalty notice. The 2024 Regulations replicate the arrangements for other regulated services in regulations.

5. Consultation

A 12-week public consultation was undertaken between 15 May 2023 and 6 August 2023 on the suite of draft regulations making up the regulatory framework and accompanying statutory guidance for the *special school*

residential services. The consultation was drawn to the attention of key stakeholders including the current residential special schools, local authorities, the Children's Commissioner for Wales, CIW, Estyn, and Social Care Wales. A meeting of the stakeholder group was convened during the consultation period. The report on the summary of consultation responses can be found [here](#).

PART 2 – REGULATORY IMPACT ASSESSMENT

The Special School Residential Services (Service Providers and Responsible Individuals) (Wales) Regulations 2024 (“the 2024 Regulations”).

6. Options

Two options have been considered in the analysis of the costs, benefits, and risks for the 2024 Regulations. The options are:

6.1 Option one Do nothing – there will be:

- No new stand-alone regulations to regulate the standard of care and support to be provided by *special school residential service* providers.
- No amendment to the Regulated Services (Annual Returns) (Wales) Regulations 2017. Under this option *special school residential services* will still be required to prepare an annual return but the content will be restricted to the information on the face of the 2016 Act (section 10(2)(a)(i)-(vi) and 10(2)(b)):
 - the regulated services the service provider is registered to provide.
 - the places at, from or in relation to which the provider is registered to provide the service.
 - the name of the responsible individual for each place.
 - the date of registration.
 - details of other conditions imposed on the service provider’s registration.
 - details of the number of persons to whom care and support has been provided during the year for each service.
 - a statement setting out how the service provider has complied with regulations made under section 27(1) specifying the standard of care and support that must be provided by a service provider.
- No amendment to the Regulated Services (Penalty Notices) (Wales) Regulations 2019 to apply to *special school residential services*.

6.1.1 Costs

- Standard of care and support

As this option is the “do nothing” option, no additional costs or savings have been identified for Welsh Government, CIW or the service providers.

- Annual returns

While this is the baseline option, it should be noted there would be costs to Welsh Government, specifically for CIW as the service regulator, and service providers under this option. For the purposes of this RIA, these are not additional costs, however, they are summarised below to enable a comparison

to be made with the alternative option. CIW will incur a cost for extending the online system for the submission of *special school residential service* provider shortened annual returns. All the existing service providers currently provide regulated services. The online system would need to be adapted to enable the service provider to complete full and shortened versions of the annual return for the different services.

There would be minimal costs to *special school residential service* providers regarding the preparation of an annual return as most of the information will be prepopulated from the registration information held on CIW's system. Service providers will still need to compile and submit the number of persons to whom care and support has been provided during the year for each service. Service providers will also be required to prepare and include the statement stating how they have complied with the requirements in regulations made under section 27(1) of the 2016 Act.

There will be a staff time cost to service providers to complete the annual return required under this option, and without a prescribed form this is expected to be longer than option two. However, assessing the precise cost of this option for service providers is problematic as it will vary depending on the size of the service provider and their current organisational practices and processes.

- Penalty notices

As this option is the “do nothing” option, no additional costs or savings have been identified for Welsh Government, CIW or the service providers.

6.1.2 Risks

- Standard of care and support

As this option is the “do nothing” option several risks have been identified. The NMS for Residential Special Schools will be retained, and CIW will not have the enforcement powers to deal with a failure by a service provider or designated responsible individual. The service providers will continue to be inspected against a minimum standard which is not consistent with the broader policy direction on regulation and inspection established under the 2016 Act. This option will not respond effectively to the Independent Inquiry into Child Sexual Abuse (2022) recommendation and may have unintended consequences for the on-going quality of services and the outcomes for individuals attending the services.

- Annual returns

This option will create a risk of not fulfilling the intention set out in the 2016 Act, which is to have accurate, relevant, and comparable information available to the public across all services. The *special school residential services* will not be required to provide workforce, training, and other information about the service as none will have been prescribed. The information provided will be very limited

and provide insufficient insight into the quality of the service delivery. There will be no requirement as to the format of the annual return and the timescale within which to submit the return. This will be less user-friendly, both for service providers and CIW.

This option will create an inconsistency between the requirements placed on existing regulated services and the *special school residential services* and could be unhelpful to the public and have reputational consequences for the Welsh Government.

- Penalty notices

To do nothing and for the regulations not to apply to *special school residential services*, will not provide CIW with the full powers to deal with a failure by a service provider or a responsible individual to comply with the requirements imposed on them under the 2016 Act.

There is a risk that an unscrupulous service provider or responsible individual who continually fails to comply with the regulations will not make the necessary improvements because the enforcement mechanisms would not act as a sufficient deterrent to non-compliance. This option will create an inconsistency between the existing regulated services and the *special school residential services* in terms of the powers of enforcement available to the regulator and this could be unhelpful to the public.

This option will create an inconsistency between existing regulated services and the *special school residential services* in terms of the consequences of breaching the requirements in regulations and hence create an uneven playing field. This could be unhelpful to the public and providers of other regulated services and may have reputational consequences for the Welsh Government.

6.1.3 Benefits

- Standard of care and support

As this option is the “do nothing” option no significant benefits have been identified.

- Annual returns

No significant benefits have been identified in relation to this option.

- Penalty notices

For some service providers there would be cost savings in not having to pay fines for non-compliance of certain requirements.

6.2 Option two: Make the Special School Residential Services (Service Providers and Responsible Individuals) (Wales) Regulations 2024:

- New stand-alone regulations to regulate the standard of care and support to be provided by *special school residential service* providers and designated responsible individuals, as a regulated service based on the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.
- Amend the Regulated Services (Annual Returns) (Wales) Regulations 2017 to apply to *special school residential services*. This will mean the following annual return information will be provided, in addition to the information required on the face of the 2016 Act (under section 10(2)(a)(i)-(vi) and 10(2)(b)):
 - a description of the arrangements in place for identifying, planning, and meeting the training needs of the *special school residential service* staff.
 - information about workforce planning undertaken, specifically a description of the arrangements in place for the recruitment and retention of staff employed by the *special school residential service*.
 - additional information to be included in the annual return, specifically contact details, staffing arrangements and information about the service.

This will also require that the annual return uses a specific format and is submitted online and within a specified timeframe of within 56 days of the end of the financial year to which it relates.

- Amend the Regulated Services (Penalty Notices) (Wales) Regulations 2019 to apply to *special school residential services*. This will mean the system of penalty notices and prescribed offences for which a penalty notice may be issued will apply to *special school residential services*.

6.2.1 Costs

- Standard of care and support

The addition of the four existing residential special schools as *special school residential services* as regulated services will increase the monitoring and inspections to be undertaken by CIW. The estimated annual cost based on 2023-24 figures is £15,000 which equates to an additional 0.25 inspector. This will be a recurring cost.

There will be financial and time costs for the sector. This will include the cost of registering the manager and staff with Social Care Wales and ensuring all staff meet or are working towards the qualification requirements. The designated responsible individual is required to supervise the management of the service to ensure effective and compliant service provision. As part of the supervision the responsible individual must visit the service in person at least every 3 months to meet staff and individuals who attend the service.

The existing *special school residential services* will be required to review current policies and procedures to ensure compliance with the requirements within the regulations. They will also need to ensure processes and procedures are in place to comply with the notification requirements and record keeping. Although it is not possible to quantify the financial or time costs as each *special school residential service* situation is different, all the existing providers are local authorities with other regulated services and are familiar with the requirements.

- Annual returns

There will be a cost to Welsh Government, specifically for CIW as the service regulator, in extending the online system for the submission of *special school residential service* provider annual returns. For the purposes of this RIA, these are not additional costs, however, they are summarised below to enable a comparison to be made with the alternative option. CIW will incur a cost for extending the online system for the submission of *special school residential service* provider annual returns. The ability to set the time limit for *special school residential service* providers to return the annual return form to Welsh Ministers will support CIW in focused forward planning work programmes.

There will be a cost to service providers to complete the annual return required under this option. However, by extending the existing online system some of the form will be prepopulated from the registration information and is completed via an online portal. The prescription of information to be provided and the form to be completed establishes an efficient and effective system, reducing subjectivity and ambiguity. The estimated provider staff time to complete the online form is approximately 11 hours. The Annual Survey of Hours and Earnings (ASHE) provides figures on hourly earnings for different occupations in the survey data. The costs to complete the online form is therefore likely to be between £230 and £390.

Occupation	Hourly gross pay (Wales, median, 2022)	Hourly gross pay including on-costs (30%)	Cost to complete annual return (assumes 11 hours, rounded to nearest £10)
H&SS Managers and Directors	27.15	35.30	390
Managers and Proprietors in Health and Care Services	20.07	26.09	290
Administrative occupations – Office managers and supervisors	15.88	20.64	230

[Earnings and hours worked, region by occupation by four-digit SOC: ASHE Table 15 - Office for National Statistics \(ons.gov.uk\)](#)

- Penalty notices

Under this option there would be costs to service providers and responsible individuals receiving penalty notices because of non-compliance with certain requirements. The sums payable is set out in the existing regulations applying to other regulated services. Section 52 of the 2016 Act restricts the amount of the sum payable to two and a half times level 4 on the standard scale. Level 4 on the standard scale is currently £2,500.

CIW would continue to apply its current proportionate approach to enforcement in operating a penalty notice scheme. The frequency of issuing such fines would depend on the number of breaches. Implementing a penalty notice scheme to include *special school residential services* could arguably reduce the number of prosecutions brought forward by CIW, thereby contributing towards a saving in time and legal costs. Similarly, the service provider or responsible individual may opt to pay the penalty rather than go through the lengthy process of criminal proceedings. A Justice System Impact Identification has been completed <https://documents.hf.wales.gov.uk/id:A45524428/document/versions/published>

6.2.2 Risks

- Standard of care and support

Under this option there is a small risk of the existing *special school residential services* being unable to meet all the requirements in regulations. To mitigate this risk several stakeholder meetings have been held to discuss the proposed approach to regulation based on the suite of regulations and the statutory guidance which make up the regulatory framework under the 2016 Act. Representatives from CIW and Social Care Wales have also attended the stakeholder meetings to provide advice and guidance, and this will continue to be made available. Additionally, our stakeholder engagement provided useful insight into how the services operate in practice. They have already adopted many of the proposed requirements, but this varies between individual services.

- Annual returns

No significant risks have been identified however there is a small risk that there may be technical issues associated with the completion of annual returns. To mitigate this ICT support will be made available from CIW.

- Penalty notices

There is a risk that service providers and responsible individuals could challenge the penalty notices issued which would result in CIW having to take forward proceedings, which is costly and time-consuming. The risk will be mitigated by developing operational guidance and providing awareness raising sessions about how the scheme will be implemented in practice. This guidance would set out the circumstances in which it would be appropriate to issue a

notice – for example, if there were consistent levels of non-compliance against a particular regulation and this had not been resolved within a certain period.

6.2.3 Benefits

- Standard of care and support

The proposed approach will bring the residential element of residential special schools into the scope of regulation under the 2016 Act. Service providers will be required to meet requirements set out in regulations in relation to the quality and safety of the care and support provided and focus on the individual's well-being and outcomes. These requirements include the suitability of the service, the environment, staffing, staff training and safeguarding. Responsible individuals will be required to meet requirements set out in regulations to ensure the effective oversight and management of the service, including the duty to appoint a manager. The regulations will prescribe which breaches of the requirements will be treated as offences. The services will be inspected by CIW. The regulator will have powers of enforcement under the regulatory framework.

- Annual returns

The completion of an annual return including the additional prescribed information by *special school residential services* will fulfil the intention set out in the 2016 Act, which is to have accurate, relevant, and comparable information available to the public across all regulated services. The information will also provide a greater level of insight into the quality of the service delivery. This option supports a consistent approach across all the regulated services, including the ability to set the time limit to submit the annual return, and in prescribing the form to be completed. This will help the public and CIW in comparing information across services.

- Penalty notices

Extending the regulations to apply the penalty notice scheme to *special school residential services* provides CIW with a full range of powers at its disposal to deal with regulatory breaches. In appropriate circumstances CIW can opt to issue a penalty notice which sends a clear message to service providers and responsible individuals who are failing to comply with their duties. This option supports a consistent approach across all the regulated services.

7. Conclusion

Having analysed the costs, risks and benefits of each option, the preferred option is **Option 2 – Make:**

- **new stand-alone regulations to regulate the standard of care and support to be provided by special school residential service**

providers and designated responsible individuals, as a regulated service based on the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.

- **Amend the Regulated Services (Annual Returns) (Wales) Regulations 2017 to apply to *special school residential services*.** This will mean the following annual return information will be provided, in addition to the information required on the face of the 2016 Act (under section 10(2)(a)(i)-(vi) and 10(2)(b)):
 - a description of the arrangements in place for identifying, planning, and meeting the training needs of the *special school residential service* staff.
 - information about workforce planning undertaken, specifically a description of the arrangements in place for the recruitment and retention of staff employed by the *special school residential service*.
 - additional information to be included in the annual return, specifically contact details, staffing arrangements and information about the service.

This will also require that the annual return uses a specific format and is submitted online and within a specified timeframe of within 56 days of the end of the financial year to which it relates.

- **Amend the Regulated Services (Penalty Notices) (Wales) Regulations 2019 to apply to special school residential services.** This will mean the system of penalty notices and prescribed offences for which a penalty notice may be issued will apply to *special school residential services*.

8. Competition Assessment

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	Yes
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	Yes
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	Yes
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	Yes

Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector categorised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range, or location of their products?	No

The response to Q6 is yes because new entrants to the market will be required to meet higher accommodation standards as a method of improving the quality of the service provision. There are only four existing residential special schools which will fall to be regulated as *special school residential services* and for the purposes of the filter test this means that the market share of two firms equals 50%. We do not consider it necessary to undertake a competition assessment for this Regulation since it will not have a detrimental effect on competition or affect the business or third sector in any significant way.

9. Post implementation review

CIW will monitor the implementation of these Regulations following their coming-into-force date of 29 February 2024.